

RECEIVED

HEARINGS BUREAU

[illegible]

ORDER MODIFYING AND REMANDING
Page 1

Counsel for the Charging Parties submitted a document entitled "Order Reversing and Dismissing Final Agency Decision." Counsel for Respondents submitted a document entitled "Respondents' Objection to Charging Parties' Proposed Order Reversing and Dismissing Final Agency Decision." The Commission considered these documents and the entire matter on March 20, 2006.

After review and consideration of the complete record, including arguments of counsel, the Commission makes the following determinations.

STANDARD OF REVIEW

When reviewing an appeal of a Final Agency Decision, the Commission may reject or modify the conclusions of law. The Commission may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in its order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. §§ 49-2-204, 2-4-621(3); Admin. R. Mont. 24.9.1717.

The Commission rejects or modifies several of the conclusions of law and findings of fact set forth in the Final Agency Decision. The findings of fact are rejected or modified because they were not based upon competent substantial evidence, as stated with particularity herein. "Substantial evidence is more than a mere scintilla of evidence, but may be less than a preponderance." Schmidt v. Cook, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511.

SUMMARY

As set forth herein, the Commission rejects the conclusion of the Final Agency Decision that Respondents did not retaliate against the Charging Parties for engaging in activities protected by the Human Rights Act. See Mont. Code Ann. § 49-2-301.

FINDINGS OF FACT

18.

Final Agency Decision: 18. To view the web sites, Wilson and Schumacher had to locate the access history and open the sites from that history. They could not reasonably have believed that the presence of the access history on the parish computer system constituted sexual harassment of any person, whether parish employees (including them) or other users of the parish computer system. Nor did they have any facts from which they could reasonably have believed that access of pornographic sites caused them to receive (at Wilson's e-mail address) pornographic spam.

Commission determination: the second and third sentences are not based upon competent substantial evidence. The Sexual Ethics Policy of the Diocese prohibited "any behavior intending to cause or resulting in illicit sexual gratification regardless of the extent of physical contact." Ex. 248A-4. According to the Policy, the Diocese "Encourages the Reporting of Any Possible Violation of Its Sexual Ethics Policy." Ex. 248A-4. In November 2001, a new computer was installed. Tr. 397, 558. Around Christmas 2001, Wilson began to receive pornographic e-mail. Tr. 558. Because of the manner in which the computer was set up, a window showed a portion of the e-mail. Thus, a portion of the e-mail was viewed without opening the e-mail. Tr. 198. At the beginning of 2002, Schumacher was looking for a document on the computer system, clicked on history, and discovered pornography. Tr. 484-85. The pornography was very offensive and upsetting. Tr. 485, 561.

Finding of Fact as modified by Commission:

18. To view the web sites, Wilson and Schumacher had to locate the access history and open the sites from that history. They reasonably believed that the presence of the access

history on the parish computer system constituted sexual harassment by creation of a hostile work environment for users of the parish computer system. They reasonably believed that the access of pornographic sites caused them to receive (at Wilson's e-mail address) pornographic spam. The computer displayed a portion of an e-mail, even if the e-mail was not opened.

19.

Final Agency Decision: 19. On or about January 9, 2002, Schumacher told diocesan Vicar General Father Jay Peterson that someone had been accessing adult-only web sites on the parish office computer. Peterson and Joe Loncki, diocesan business manager, went to St. Luke's and confirmed this access by viewing one of the web sites. The web site had explicit pictures of varieties of sexual intercourse and sexual activities.

Commission determination: the statement that Schumacher told Peterson is not based upon competent substantial evidence. Tr. 490, 561, 609. With respect to Peterson's duties, the finding is incomplete. Tr. 608.

Finding of Fact as modified by Commission:

19. On or about January 9, 2002, Wilson told diocesan Vicar General Father Jay Peterson that someone had been accessing adult-only web sites on the parish office computer. Peterson is the supervisor of the bishop's staff and, at times, represents the bishop in his place. Peterson and Joe Loncki, diocesan business manager, went to St. Luke's and confirmed this access by viewing one of the web sites. The web site had explicit pictures of varieties of sexual intercourse and sexual activities.

20.

Commission determination: the Finding is incomplete. Tr. 495, 733.

Finding of Fact as modified by Commission:

20. [Same as Final Agency Decision]. It was inappropriate for Peterson to ask Schumacher to write down the history. Loncki observed that Schumacher was upset and distressed.

21.

Commission determination: the Finding is incomplete. Tr. 197-98, 635, 637, 639, 666.

Finding of Fact as modified by Commission:

21. [Same as Final Agency Decision]. However, Peterson failed to take appropriate action. Peterson instructed Joe Pipinich to clean up the computer. Peterson made no effort to follow-up with Pipinich and determine what he had done with the computers, or inform Wilson and Schumacher of what had been done to clean the computers, or ascertain that pornography was no longer appearing on the computers at St. Luke's. The feature of the computer displaying a portion of the content of an e-mail, without the e-mail being opened, was not corrected until 2004.

22.

Commission determination: the Finding is incomplete. Tr. 733-35.

Finding of Fact as modified by Commission:

22. [Same as Final Agency Decision]. However, Loncki failed to take appropriate action. He conducted no follow-up with Wilson or Schumacher. He did not determine whether e-mail accounts at St. Luke's were receiving pornographic e-mails. Although the diocese works with an ISP provider to block spam at the offices of the diocese, he did not contact the ISP provider to block e-mails sent to Wilson. He had no discussion with the person Peterson sent to St. Luke's to clean the computer.

26.

Commission determination: the Finding is not based upon competent substantial evidence. Tr. 615-16. The Finding summarizes and quotes from Tranel's letter to Peterson dated January 24, 2002 (Ex. 419D-1 to -3). Tranel did not testify at the hearing. The letter is hearsay if considered to prove the truth of the matters asserted therein. Part of the letter could be within a hearsay exception as a record of a regularly conducted activity—specifically, the diagnosis of a health care provider. But the content of the letter, and the Finding, is not limited to a diagnosis. In addition, Tranel is not a medical doctor and the purpose of Tranel's meeting with Zabrocki was not medical diagnosis or treatment. Thus, the hearsay exception for such statements does not apply and reports in the letter of statements made by Zabrocki to Tranel are hearsay. Tranel's letter dated November 12, 2003 (Ex. 419D-4 to -5) does not appear to be within any hearsay exception. Hearsay is not sufficient to support a finding.

Finding of Fact as modified by Commission:

26. Tranel told Peterson that in Tranel's opinion, Zabrocki was fit for ministry.

27.

Commission determination: the Finding is not based upon competent substantial evidence, for the reasons set forth herein regarding Finding 26.

Finding of Fact as modified by Commission:

27. Peterson shared information with Bishop Milone that Peterson had obtained from Tranel. Bishop Milone decided that Zabrocki could continue as pastor of St. Luke's.

28.

Final Agency Decision: 28. Zabrocki remained pastor at St. Luke's. The diocese itself did not take action to obtain a third-party evaluation of the "social milieu" at St. Luke's.

Instead, the diocese assisted Zabrocki in bringing the staff and councils under his control and direction by encouraging him to take more aggressive actions to assume control and direction over the parish activities.

Commission Determination: the second sentence quotes from a hearsay document (Ex. 419D-2). Hearsay is not competent substantial evidence. The third sentence is not based upon competent substantial evidence. It is also so vague about time periods as to be misleading and incomplete. Zabrocki testified that he “was instructed to try on my own, to improve communication within and among staff.” Tr. 120-21. Peterson testified that “Our concern was to help Father Pat [Zabrocki] deal with the psychological stressors.” Tr. 673. But Peterson did not specifically identify what, if anything, the diocese did to help Zabrocki. Tr. 673-77. In November 2003, Peterson and other members of the staff of the diocese met with the St. Luke’s Pastoral Council at a meeting that identified conflicts between the council and staff. Tr. 624-27, Ex. 261A. However, the decision to allow Zabrocki to remain pastor had been made much earlier, in about late January 2002.

Finding of Fact as modified by Commission:

28. Zabrocki remained pastor at St. Luke’s.

31.

Final Agency Decision: 31. The flow of pornographic e-mails continued. Later in 2002, Wilson and Schumacher appealed to Peterson for help in stopping it. He forwarded a computer program designed to block such span, which the two women did not understand and did not install. He also directed Joe Pipinich of the Diocese of Pastoral Offices, a staff employee with a background in computer operation, to remove any downloaded adult-only web sites from the computer and clean the computers of such materials. Peterson assumed these actions

adequately addressed the problems of the e-mails and the web history, pending any further reports of continuing problems.

Commission determination: parts of the Finding are not based upon competent substantial evidence. In other respects, the Finding is so vague about time periods as to be misleading and incomplete. As part of her job, Wilson had to use e-mail. Tr. 497. Wilson continued to receive pornographic e-mails sent to her e-mail account. Both Wilson and Schumacher used the computer that was receiving the pornography. Tr. 513. Occasionally Schumacher would check Wilson's e-mail. Tr. 532. Hundreds of pornographic e-mails were received each week. Tr. 510-11. Wilson and Schumacher cleaned it up without assistance. Tr. 497-98. Wilson informed Peterson of the continuing pornographic e-mails in person in July 2002. Tr. 511, 617. Peterson e-mailed Wilson a program named Mailwasher. Tr. 511. Peterson provided no instructions. Wilson tried to use the program, but it was not effective. Tr. 512. Except for e-mailing the Mailwasher program, the diocese did nothing to ensure that Wilson and Schumacher would not receive offensive e-mails. Tr. 513, 536-37. Peterson assumed Mailwasher would be effective. Tr. 640. Peterson did not follow-up himself or send anyone to determine whether the Mailwasher program was being effective for Wilson. Tr. 641. Peterson sent Pipinich to St. Luke's to clean the computer after Wilson's report in January 2002. Tr. 634-35. That was the one time Peterson sent Pipinich to St. Luke's. Tr. 637. Peterson did not send a computer technician to St. Luke's after Peterson sent Wilson the Mailwasher program. Tr. 640-41.

Finding of Fact as modified by Commission:

31. As part of her job, Wilson had to use e-mail. Wilson continued to receive pornographic e-mails sent to her e-mail account. Both Wilson and Schumacher used the computer that was receiving the pornography. Occasionally Schumacher would check Wilson's

e-mail. Hundreds of pornographic e-mails were received each week. Wilson and Schumacher cleaned it up without assistance. Wilson informed Peterson of the continuing pornographic e-mails in person in July 2002. Peterson e-mailed Wilson a program named Mailwasher. Peterson provided no instructions. Wilson tried to use the program, but it was not effective. Except for e-mailing the Mailwasher program, the diocese did nothing to ensure that Wilson and Schumacher would not receive offensive e-mails. Peterson assumed Mailwasher would be effective. Peterson did not follow-up himself or send anyone to determine whether the Mailwasher program was being effective for Wilson.

32, 33, 34.

Final Agency Decision: 32. Wilson and Schumacher received pornographic e-mails for two years following January 2002. [footnote 9 omitted] They did not again complain to Peterson or anyone else at the diocese that they continued to receive unsolicited pornographic e-mails. They concluded that since the diocese had not removed or suspended Zabrocki for his web site activities and had not somehow stopped the spam after their first complaint, it would take no further action to stem the flow of the spam. This conclusion was not reasonable.

33. In July 2002, Peterson asked Wilson how she and Schumacher were doing. Wilson responded that Schumacher was still having difficulties and had stopped attending mass at St. Luke's because of Zabrocki's conduct. Peterson replied that although it was unfortunate, it was Schumacher's decision not to attend mass at St. Luke's. Wilson did not mention the pornographic e-mails in this conversation.

34. With no notice that the pornographic spam was continuing, the diocese did not follow up either to find out if the e-mail was still coming in or to assist Wilson and Schumacher in dealing with it if they were still receiving it.

Commission determination: parts of these findings are not based upon competent substantial evidence. The findings are also incomplete and omit important information. As described herein in the discussion of Finding 31, the pornographic e-mail was received at Wilson's e-mail address. Wilson informed Peterson of the continuing pornographic e-mails in person in July 2002, and in response Peterson e-mailed the Mailwasher program to Wilson. Hundreds of pornographic e-mails arrived each week. Tr. 510-11. The e-mails admitted in evidence were not all of the e-mails received. Tr. 560. The pornographic e-mails continued for the duration of Wilson's employment. Tr. 562.

On January 14, 2002, Zabrocki met with Peterson, Wilson, and Schumacher. Zabrocki said he was sorry Schumacher had to write down the websites and that they would not see them again. Schumacher did not feel this was an apology. Tr. 506-08. Schumacher felt that Zabrocki was not sorry for accessing pornography, but instead sorry that Schumacher and Wilson found out that he had. Tr. 541. Schumacher thought that Zabrocki had to know that by accessing pornographic sites on an office computer, there was a possibility that other people in the office would discover them. Tr. 531. Zabrocki began making changes in job conditions almost immediately after the "apology." Tr. 563.

Schumacher had no knowledge that the diocese had attempted to clean the computers. She did not see any results. She felt that if she complained to the diocese, she would not be listened to. Tr. 542. When Peterson e-mailed the Mailwasher program, he sent a note that gave Schumacher the impression that it was Wilson's fault that she was getting the offensive e-mails. Schumacher was astonished by this. Tr. 511-12. After the Mailwasher program was ineffective, Wilson tried working with the internet provider. Wilson and Schumacher felt they could not get help from the diocese. Tr. 512.

During a conversation with Peterson in July 2002, Wilson told Peterson that she and Schumacher were being subjected to retaliation, such as their salaries being frozen. Peterson replied, "I can't do anything about that." Tr. 562-63.

In September 2003, Wilson and Schumacher met with Ugrin, a member of St. Luke's parish who was an attorney, and reported their work problems to him. Tr. 374, 503, 546. Ugrin reported the apparent retaliation to another attorney, Davis, who was counsel for the diocese. Tr. 376-77, 384.

Findings of Fact as modified by Commission:

32. The pornographic e-mails continued to be received at Wilson's e-mail address for the duration of Wilson's employment. The e-mails admitted in evidence were not all of the e-mails received. After Wilson complained about the pornography on the office computer to Peterson in January 2002 and again in July 2002, neither Wilson nor Schumacher complained to Peterson about the pornography. In September 2003, Wilson and Schumacher met with Ugrin, a member of St. Luke's parish who was an attorney, and reported their work problems to him. Ugrin reported the apparent retaliation to another attorney, Davis, who was counsel for the diocese.

33. Schumacher felt that if she complained to the diocese, she would not be listened to. Schumacher had no knowledge that the diocese had attempted to clean the computers. She did not see any results. When Peterson e-mailed the Mailwasher program, he sent a note that gave Schumacher the impression that it was Wilson's fault that she was getting the offensive e-mails. Schumacher was astonished by this.

34. After the Mailwasher program was ineffective, Wilson tried working with the internet provider. During a conversation with Peterson in July 2002, Wilson told Peterson that

she and Schumacher were being subjected to retaliation, such as their salaries being frozen.

Peterson replied, "I can't do anything about that."

Wilson and Schumacher felt they could not get help from the diocese. This conclusion was reasonable.

40.

Commission determination: the Finding is incomplete. Tr. 128, 266, 563.

Finding of Fact as modified by Commission:

40. [Same as Final Agency Decision]. However, consideration of past practices and of the timing of Zabrocki's adverse employment actions against Wilson and Schumacher demonstrates the causal connection between their opposition to a work environment containing pornography on the computers they were required to use and the adverse employment actions. For two and one-half years, Zabrocki did not exercise his powers as pastor to change parish operations. Deficits in the parish budget had been projected before 2003, but Zabrocki had not previously made staffing changes because of them. Zabrocki began taking adverse actions in February 2002, soon after the complaints about pornography on the office computers.

Additional Finding of Fact by Commission:

71. To the extent that the part of the Final Agency Decision under the heading "TV. Opinion" contains findings of fact that are inconsistent with the Commission's modifications of Findings of Fact as stated herein; such findings are rejected for the reasons set forth herein.

CONCLUSIONS OF LAW

2.

Final Agency Decision: 2. Respondents did not retaliate against charging parties for engaging in activities protected by the Human Rights Act. Mont. Code Ann. § 49-2-301.

Commission determination: the Conclusion is incorrect.

Conclusion of Law as modified by Commission:

2. Respondents did retaliate against Charging Parties for engaging in activities protected by the Human Rights Act. Mont. Code Ann. § 49-2-301.

Commission determination: additional Conclusions of Law should be made, as follows:

3. "It is an unlawful discriminatory practice for a person . . . to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter." Mont. Code Ann. § 49-2-301.

4. The statute prohibiting retaliation protects two kinds of activities: (1) opposition to discrimination and (2) participation in investigation of discrimination. Retaliation is prohibited separately from the underlying alleged discrimination. Mahan v. Farmers Union Cent. Exch. Inc. (1989), 235 Mont. 410, 422, 768 P.2d 850, 858.

5. A person may establish retaliation without establishing an underlying discrimination claim. E.g., Fine v. Ryan Int'l Airlines, 305 F.3d 746, 752 (7th Cir. 2002); Trent v. Valley Elec. Ass'n, Inc., 41 F.3d 524, 526 (9th Cir. 1994).

6. A prima facie case of retaliation requires showing that the Charging Party engaged in protected activity, was thereafter subjected to adverse employment action, and there was a

causal link between the protected activity and adverse action. Beaver v. Montana Dep't Natural Resources & Conservation, 2003 MT 287 ¶ 71, 318 Mont. 35, 78 P.3d 857.

7. With respect to Mont. Code Ann. § 49-2-301, to engage in protected activity means to oppose any practices prohibited by Mont. Code Ann. Tit. 49, ch. 2. Title VII of the Civil Rights Act of 1964 contains a similar prohibition against retaliation in 42 U.S.C. § 2000e-3(a). Often the opinions of federal courts that discuss whether there has been retaliation in violation of that provision employ a two-part test with subjective and objective parts. The person alleging retaliation must have a good faith belief that he/she was opposing illegal discrimination. This is the subjective test. In addition, this belief must be reasonable. This is the objective test. E.g., Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1187 (11th Cir. 2001). In practice in the Ninth Circuit, the test is easily met. For example, the court found protected activity for purposes of a retaliation claim where an employee attended one mandatory meeting where foul language and sexually offensive references were made. Trent v. Valley Elec. Ass'n, Inc., 41 F.3d 524, 527 (9th Cir. 1994). Strict application of the threshold test would be inconsistent with the rule that a retaliation claim can be maintained even where there is no underlying discrimination. Furthermore, as the threshold test becomes more strictly applied, the risk increases that an employer will get away with retaliating against an employee who opposed conduct that was arguably discriminatory. This could discourage others from bringing claims of discrimination. Even an absolute prohibition against retaliating against any employee who had alleged discrimination would not unfairly hamper employers, because the employer would be free to discharge an employee for other legitimate reasons. However, the Commission has not found an opinion of the Montana Supreme Court analyzing the threshold test often employed by federal courts to retaliation claims.

8. The totality of the circumstances is considered to determine whether a work environment is hostile. Benjamin v. Anderson, 2005 MT 123, ¶¶ 53, 56, 327 Mont. 173, 112 P.3d 1039. Here, the Charging Parties were required to use computers and e-mail as part of their jobs. Beginning late in 2001 they encountered pornography on these computers. In addition to the offensive content of the pornography itself, the quantity and persistence of the pornography was also distressing. They subjectively and objectively believed that the pornography created a hostile work environment. The first part of a retaliation case was established.

9. The causal link can be established by showing that the protected activity was closely followed in time by the adverse employment action. E.g., Cifra v. General Elec. Co., 252 F.3d 205, 217 (2d Cir. 2001); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1255 (10th Cir. 2001). Here, Zabrocki was assigned to St. Luke's in mid-1999 and did not make changes in the employment of the Charging Parties for more than two and one-half years. Then, soon after the Charging Parties complained to the diocese about the pornography on the computers, Zabrocki began a series of adverse employment actions against the Charging Parties. In July 2002, Peterson received reports of both pornography and retaliation and failed to take appropriate, timely, and effective remedial action. The causal link is established.

10. The causal link is also established by the fact that after the Charging Parties complained about pornography on the computers used in their workplace, only they, and not any others similarly situated on the parish staff, were subjected to adverse employment actions. Although a janitor did not receive pay increases, the janitor was not similarly situated because unlike the Charging Parties, his job performance was deficient.

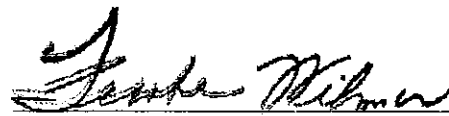
11. To the extent that the part of the Final Agency Decision under the heading "IV. Opinion" contains conclusions of law that are inconsistent with the Commission's Conclusions of Law as stated herein, such conclusions are rejected.

ORDER

IT IS HEREBY ORDERED:

1. As stated herein, the Commission modifies the Final Agency Decision and reverses the conclusion that Respondents did not retaliate against the Charging Parties.
2. The Commission remands this matter to the Hearings Bureau for proceedings on damages and affirmative relief.

DATED this 28th day of March 2006.



Chair Franke Wilmer
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 28th day of March 2006.

ELIZABETH BEST
BEST LAW OFFICES
PO BOX 2114
GREAT FALLS, MT 59403-2114

GREG HATLEY
DAVIS HATLEY HAFFEMAN & TIGHE PC
PO BOX 2103
GREAT FALLS, MT 59403


Montana Human Rights Bureau